

138 FEDERAL RULES OF CRIMINAL PROCEDURE

**RULES GOVERNING PROCEEDINGS IN THE
UNITED STATES DISTRICT COURT UNDER
§ 2254 OF TITLE 28, UNITED STATES CODE**

Rule 2. Petition

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(e) **Return of insufficient petition.** If a petition received by
filed with the clerk of a district court does not
substantially comply with the requirements of rule 2 or
rule 3, it may be returned to the petitioner, if a judge of
the court so directs, together with a statement of the
reason for its return. The clerk shall retain a copy of the
petition.

COMMITTEE NOTE

Rule 2(e) has been amended to conform it to language in Federal Rule of Civil Procedure 5(e). No change in practice is intended by the amendment.

Rule 3. Filing Petition

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(b) Filing and service. ~~Upon receipt of the petition and the~~

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~~filing fee, or an order granting leave to the petitioner to~~

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~~proceed in forma pauperis, and having ascertained that~~

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~~the petition appears on its face to comply with rules 2 and~~

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~~3, the~~ The clerk of the district court shall file the petition

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and enter it on the docket in ~~his~~ the clerk's office. The

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filing of the petition shall not require the respondent to

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answer the petition or otherwise move with respect to it

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unless so ordered by the court.

COMMITTEE NOTE

The first portion of Rule 3(b) has been deleted because it conflicts with the requirement in Federal Rule of Civil Procedure 5(e) that the clerk file the papers. The amendment also conforms to current practice; the clerk files the petition and refers it to the court for its consideration of any defects in the petition.

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Rule 6. Discovery

1 **(a) Leave of court required.** A party shall be entitled to
2 invoke the processes of discovery available under the
3 Federal Rules of Civil Procedure if, and to the extent that,
4 the judge in the exercise of his discretion and for good
5 cause shown grants leave to do so, but not otherwise. If
6 necessary for effective utilization of discovery
7 procedures, counsel shall be appointed by the judge for a
8 petitioner who qualifies for the appointment of counsel
9 under 18 U.S.C. ~~§ 3006A(g)~~ § 3006A.

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COMMITTEE NOTE

 The amendment to Rule 6(a) reflects amendments to 18 U.S.C.
§ 3006A.

Rule 8. Evidentiary Hearing

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2 **(b) Function of the magistrate judge.**

3 **(1)** When designated to do so in accordance with 28
4 U.S.C. § 636(b), a magistrate judge may conduct
5 hearings, including evidentiary hearings, on the
6 petition, and submit to a judge of the court proposed
7 findings of fact and recommendations for disposition.

8 **(2)** The magistrate judge shall file proposed findings and
9 recommendations with the court and a copy shall
10 forthwith be mailed to all parties.

11 **(3)** Within ten days after being served with a copy, any
12 party may serve and file written objections to such
13 proposed findings and recommendations as provided
14 by rules of court.

15 **(4)** A judge of the court shall make a de novo
16 determination of those portions of the report or
17 specified proposed findings or recommendations to

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18 which objection is made. A judge of the court may
19 accept, reject, or modify in whole or in part any
20 findings or recommendations made by the magistrate
21 judge.

22 **(c) Appointment of counsel; time for hearing.** If an
23 evidentiary hearing is required the judge shall appoint
24 counsel for a petitioner who qualifies for the appointment
25 of counsel under 18 U.S.C. ~~§ 3006A(g)~~ § 3006A and the
26 hearing shall be conducted as promptly as practicable,
27 having regard for the need of counsel for both parties for
28 adequate time for investigation and preparation. These
29 rules do not limit the appointment of counsel under 18
30 U.S.C. § 3006A at any stage of the case if the interest of
31 justice so requires.

COMMITTEE NOTE

The amendments to Rule 8 address two issues. First the term "magistrate" has been changed to "magistrate judge" to reflect the change in name of magistrates to United States magistrate judges. Second, the amendment to Rule 8(c) reflects amendments to 18 U.S.C. § 3006A.

Rule 9. Delayed or Successive Petitions

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(b) **Successive petitions.** ~~A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.~~ Before a second or successive petition is presented to the district court, the applicant shall obtain an order from the appropriate court

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11 of appeals authorizing the district court to consider the
12 petition.

COMMITTEE NOTE

Rule 9(b) has been amended to reflect the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 which amended 28 U.S.C. § 2244. That new provision places limitations on the ability of a petitioner to file successive applications for habeas corpus relief. Section 2244(b) explicitly states that a second or successive petition must be first presented to the appropriate court of appeals for an order that authorizes the district court to consider the application dismissed if it was presented in an earlier petition. The amendment to Rule 9(b) is intended to reflect that statutory provision.

Rule 10. Powers of ~~Magistrates~~ Magistrate Judges

1 The duties imposed upon the judge of the district court by
2 these rules may be performed by a United States magistrate
3 judge pursuant to 28 U.S.C. § 636.

COMMITTEE NOTE

Rule 10 has been amended to reflect the change in the title of United States magistrates to United States magistrate judges.